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Abbas Shrazi Davoud v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–165–06 OF 2012
AZIAH ALI, ZAKARIA SAM AND AHMADI ASNAWI JJCA
16 JUNE 2015

C *Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking of methamphetamine — Appeal against conviction and sentence — Dangerous drugs found inside sandals worn by appellant — Whether discrepancy in gross weight of drugs seized fatal to prosecution's case — Whether failure to cross examine prosecution witnesses on issue of weight of drugs amounted to acceptance of*
D *their testimony — Whether break in chain of evidence relating to exhibits — Whether custody and control established — Presumption of knowledge — Whether irresistible inference that appellant had knowledge of drugs inside sandals — Whether ignorance a defence — Inference of trafficking from quantity of drugs and manner in which it carried — Dangerous Drugs Act 1952 ss 2, 37(d)*
E *& 39B(1)(a)*

Customs officer Abdul Halim ('PW3') who was on duty at Kuala Lumpur International Airport ('KLIA') stopped the appellant and examined the sandals worn by the appellant. The sandals which were thicker than normal were
F scanned and revealed presence of drugs. PW3 handed over the appellant and the sandals to Meor Ahmad ('PW4'). PW4 arrested the appellant and took him to the investigating officer ('PW5'). Plastic packets containing drugs were found inside the sandals. PW4 marked the bulging part of the sandals and the plastic packets. PW4 then handed over the appellant together with the exhibits
G seized to PW5 who also marked the exhibits. The following day PW5 handed over the exhibits to the chemist ('PW6') who acknowledged receipt. PW6 prepared a chemist report and subsequently handed over the exhibits and the chemist report to PW5. The appellant was charged for trafficking in methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the
H Act'). At the end of the prosecution's case, the defence counsel raised two issues: (a) doubt as to identity of the drug exhibits; and (b) break in the chain of evidence relating to the exhibits. The trial judge found that the pair of sandals had been identified by PW3, PW4, PW5 and PW6 and the different terminologies used by the witnesses to describe the sandals did not affect their
I credibility. The judge found that, at the time of arrest, the appellant had custody and control of the sandals containing the drugs and the prosecution could rely on s 37(d) of the Act to presume knowledge of the drugs. However, even without the aid of s 37(d), the judge found that based on the weight of the sandals, it was unlikely that the appellant did not know what was inside the

sandals. Based on the facts, the judge found that the irresistible inference was that the appellant had knowledge of what was in the sandals. The judge found that the concealment of the drugs in the sandals together with the fact that the appellant had travelled and transported the drugs to Malaysia amounted to 'trafficking' as defined in s 2 of the Act. The appellant in his defence claimed that he had no knowledge of the drugs. The appellant contended he had been promised payment in return for sending sandals and electrical stuff from Iran to Malaysia. The appellant said that he was given the sandals to wear because the person who was to pick him up at KLIA would identify him by the sandals. The judge found the appellant guilty as charged, convicted him and sentenced him to death. The appellant appealed against the conviction and sentence on the grounds that there was discrepancy in the gross weight of the drugs seized. The initial charge stated the weight of the drugs as 400g of methamphetamine. However in the chemist report, the total net weight of the drugs was stated as 405.9g. The appellant also alleged that there was a break in the chain of evidence.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) There was no cross-examination of PW4 and PW6 on the issue of the weight of the drugs. Failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of his testimony. The burden was on the defence to cross-examine both PW4 and PW6 on this issue (see para 34).

(2) It is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department (see para 35).

(3) In the absence of any challenge by way of cross-examination of PW4, PW5 and PW6 regarding the weight of the drugs, the issue of discrepancies in the weight raised by the appellant was devoid of any merit. There was no evidence to support the suggestion that the drug exhibits could have been tampered with. Furthermore, the weight stated in the charge was the same as that stated in the chemist report. In any event, the discrepancy in the weight of the drugs alone should not ipso facto cast doubt on its identity (see para 36).

(4) The drug exhibits were marked and identified by PW4, PW5 and PW6. There was no evidence to suggest a break in the handling or custody of the exhibits which tantamounted to a break in the chain of evidence. The

drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with (see paras 37–38).

(5) There was overwhelming evidence that the appellant had custody, control and actual possession of the sandals when he was apprehended at KLIA. Once it had been proved that the appellant had physical control and possession and, based on the circumstances the sandals were acquired by the appellant, the trial judge was justified in finding that the appellant had mens rea possession of the drugs contained inside the sandals (see para 39).

(6) It was improbable for the appellant not to be suspicious about the offer made to him to carry a pair of sandals all the way to Malaysia together with a promise of a substantial sum of money for his effort, payable upon his return. He would have felt the bulges in the soles of the sandals when he used them. He would have also noticed the adhesive at the sides of the soles. Ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination (see para 40).

(7) Based on the manner the drug was being carried, ie carefully concealed in the soles of the sandals to avoid detection and, taking into account the total amount of the drug involved, the trial judge was correct to apply s 2 of the Act, that the appellant was in fact carrying or conveying the drugs for the purpose of trafficking. The prosecution had established the appellant's guilt beyond reasonable doubt. The defence had failed to raise a reasonable doubt in the prosecution's case (see paras 41–42).

[Bahasa Malaysia summary

Pegawai kastam Abdul Halim ('PW3') yang bertugas di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') telah menahan perayu dan memeriksa selipar yang dipakai oleh perayu. Selipar itu yang lebih tebal daripada biasa telah diimbas dan menunjukkan kewujudan dadah. SPW3 telah menyerahkan perayu dan selipar itu kepada Meor Ahmad ('PW4'). PW4 menangkap perayu dan membawanya kepada pegawai penyiasat ('PW5'). Bungkusan plastik yang mengandungi dadah telah dijumpai dalam selipar itu. PW4 telah menandakan bahagian mengelembong selipar itu dan bungkusan plastik itu. PW4 kemudian menyerahkan perayu bersama dengan ekshibit-ekshibit yang dirampas kepada PW5 yang juga telah menandakan ekshibit-ekshibit itu. Hari berikutnya PW5 telah menyerahkan ekshibit-ekshibit itu dan laporan kimia kepada PW5. Perayu telah disabitkan untuk pengedaran dadah methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di akhir kes pendakwaan, pembelaan telah menyebabkan peguam menimbulkan dua isu: (a) keraguan tentang identiti ekshibit-ekshibit dadah itu; dan (b) rantai keterangan yang terputus berkaitan ekshibit-ekshibit itu. Hakim perbicaraan mendapati bahawa sepasang selipar itu telah dikenal pasti

sebagai PW3, PW4, PW5 dan PW6 dan istilah-istilah berbeza yang digunakan oleh saksi-saksi untuk menggambarkan selipar itu tidak menjejaskan kebolehpercayaan mereka. Hakim mendapati bahawa, pada masa tangkapan, perayu mempunyai jagaan dan kawalan ke atas selipar itu yang mengandungi dadah itu dan pendakwaan boleh bergantung kepada s 37(d) Akta tersebut bagi memberi andaian pengetahuan tentang dadah itu. Walau bagaimanapun, meskipun tanpa bantuan s 37(d), hakim mendapati bahawa berdasarkan berat selipar itu, tidak mungkin perayu tidak mengetahui apa dalam selipar itu. Berdasarkan fakta, hakim mendapati inferens yang tidak boleh disangkal adalah bahawa perayu mengetahui apa yang ada dalam selipar itu. Hakim mendapati bahawa penyembunyian dadah dalam selipar itu bersama dengan fakta bahawa perayu dalam perjalanan dan membawa dadah itu ke Malaysia merupakan 'trafficking' seperti ditafsir dalam s 2 Akta tersebut. Perayu dalam pembelaannya mendakwa bahawa dia tiada pengetahuan tentang dadah itu. Perayu berhujah dia telah dijanjikan bayaran sebagai balasan menghantar selipar itu dan barang elektrik dari Iran ke Malaysia. Perayu mengatakan bahawa dia telah diberikan selipar itu untuk dipakai kerana orang yang akan menjemputnya di KLIA akan mengenalinya melalui selipar itu. Hakim mendapati perayu bersalah seperti dituduh, mensabitkannya dan menghukumnya mati. Perayu telah merayu terhadap sabitan dan hukuman atas alasan bahawa terdapat pertikaian dalam berat kasar dadah yang dirampas itu. Pertuduhan awal menyatakan berat dadah itu sebagai 400g methamphetamine. Walau bagaimanapun dalam laporan ahli kimia, jumlah berat bersih dadah dinyatakan sebagai 405.9g. Perayu juga menyatakan terdapat rantaian keterangan yang terputus.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada pemeriksaan langsung untuk PW4 dan PW6 tentang isu berat dadah itu. Kegagalan pemeriksaan balas saksi berhubung bahagian penting kes itu tidak merupakan penerimaan testimoninya. Beban terletak atas pembelaan untuk memeriksa balas PW4 dan PW6 tentang isu ini (lihat perenggan 34).

(2) Ia adalah pengetahuan umum bahawa proses menimbang yang dijalankan oleh polis selepas rampasan dadah itu hanya untuk tujuan pengklasifikasian dalam menentukan pertuduhan yang besar kemungkinan dipilih terhadap tertuduh dan/atau orang yang ditangkap. Lebih biasa daripada tidak perbezaan dalam berat dadah yang direkodkan tidak dapat dielakkan akibat perbezaan cara menimbang yang dipilih dan perbezaan alat menimbang yang digunakan oleh anggota polis dan jabatan kimia (lihat perenggan 35).

(3) Ketiadaan apa-apa cabaran melalui pemeriksaan balas PW4, PW5 dan PW6 berhubung berat dadah, isu perbezaan berat yang ditimbulkan oleh perayu tidak mempunyai apa-apa merit. Tiada keterangan untuk

menyokong cadangan bahawa ekshibit-ekshibit dadah boleh dibega. Tambahan lagi, berat yang dinyatakan dalam pertuduhan adalah sama seperti yang dinyatakan dalam laporan kimia. Dalam apa keadaan, perbezaan berat dadah sendiri tidak patut *ipso facto* meletakkan keraguan ke atas identitinya (lihat perenggan 36).

(4) Ekshibit-ekshibit dadah telah ditanda dan dikenal pasti oleh PW4, PW5 dan PW6. Tiada keterangan untuk mencadangkan terdapat pengendalian atau jagaan yang terputus untuk ekshibit-ekshibit itu yang sama seperti rantaian keterangan yang terputus. Ekshibit-ekshibit dadah telah dirampas daripada perayu dan sebagaimana diperiksa oleh ahli kimia adalah dadah sama-sama yang di mana perayu dipertuduhkan (lihat perenggan 37–38).

(5) Wujud banyak keterangan bahawa perayu mempunyai jagaan, kawalan dan milikan sebenar selipar itu apabila dia telah ditahan di KLIA. Setelah dibuktikan bahawa perayu mempunyai kawalan dan milikan fizikal dan, berdasarkan keadaan selipar itu diperoleh oleh perayu, hakim perbicaraan adalah wajar dalam penemuan bahawa perayu mempunyai mens rea milikan dadah yang terkandung dalam selipar itu (lihat perenggan 39).

(6) Adalah tidak mungkin untuk perayu tiada syak wasangka tentang tawaran yang dibuat kepadanya untuk membawa sepasang selipar sepanjang perjalanan ke Malaysia bersama janji sejumlah wang yang banyak kerana usahanya, yang akan dibayar setelah dia pulang. Dia pasti terasa gelembung pada alas kaki selipar itu apabila dia memakainya. Dia juga pasti telah melihat pelekat di kedua-dua belah alas kaki selipar itu. Sifat tidak hirau hanya suatu pembelaan apabila tiada sebab untuk syak wasangka dan tiada hak dan peluang untuk pemeriksaan (lihat perenggan 40).

(7) Berdasarkan cara dadah itu dibawa, iaitu dengan berhati-hati disembunyikan dalam alas kaki selipar itu untuk mengelakkan dikesan dan, mengambil kira jumlah keseluruhan dadah yang terlibat, hakim perbicaraan adalah betul untuk menggunakan s 2 Akta tersebut, bahawa perayu sememangnya membawa atau menghantar dadah bagi tujuan pengedaran. Pendakwaan telah membuktikan kebersalahan perayu melampaui keraguan munasabah. Pembelaan telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan (lihat perenggan 41–42).]]

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 991–1005.

Cases referred to

Hasbala Mohd Sarong v PP [2013] 6 MLJ 636; [2013] 6 CLJ 945, FC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
Sia Pang Liong v PP [2011] 6 CLJ 759, CA (refd)
Teh Hock Leong v PP [2008] MLJU 284; [2008] 4 CLJ 764, CA (refd)
Teuku Nawardin Syamsuar v PP [2010] MLJU 249; [2011] 3 CLJ 353, CA (refd)
Ubaka v PP [1995] 1 SLR 267, CA (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d)

Appeal from: Criminal Trial No 45A-185 of 2010 (High Court, Shah Alam)

Tina Ong (Sivananthan) for the appellant.
Muhamad Yasser bin Mohd Nasri (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] The appellant was charged for trafficking in dangerous drugs. The charge reads:

> Bahawa kamu pada 15 Jun 2010, lebih kurang jam 10.25 pagi di Kaunter Pemeriksaan Kastam 'D', Cawangan Pemeriksaan Penumpang 1, Balai Ketibaan Antarabangsa, Terminal Utama Lapangan Terbang Antarabangsa Kuala Lumpur, di dalam daerah Sepang, dalam negeri Selangor Darul Ehsan, telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 312.2 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[2] On 15 June 2010, customs officer Abdul Halim bin Sahari ('PW3') was on duty at counter 'D' at the international arrival hall, Kuala Lumpur International Airport ('KLIA'). He saw the appellant heading towards the green lane carrying a black bag pack (*beg sandang*).

[3] PW3 called the appellant and asked him to have his bag scanned. Nothing suspicious was seen. PW3 then asked the appellant to remove the sandals (exha P5A and 5B) that he was wearing and have the sandals scanned because PW3 saw that the sandals were thicker than normal. The scan showed a green image which indicated the presence of drugs. PW3 inspected the

sandals and testified amongst others as follows:

> Saya lihat kepada sandal dan dapati kesan gam yang berkilat di bahagian tengah antara tapak sandal dan tapak kaki. P11 (5-8) – saya tanda 'X' di gambar 6 di mana terdapat gam.
>
> Di kaunter pemeriksaan saya telah periksa sandal dan mendapati terdapat serbuk Kristal di dalamnya melalui bahagian yang terbuka sedikit. Saya meneliti penuh berhati-hati sehingga terjumpa bahagian yang berlubang yang nampak isi di dalamnya. Saya tidak kopak sandal.
>
> Saya terus bawa OKT menuju ke pejabat untuk diserahkan kepada pegawai narkotik yang berada di situ.

[4] PW3 handed over the appellant, the sandals and the black bag to Meor Ahmad Sazali bin Dol Hadi ('PW4'). According to PW4, PW3 told him that the scanning of the sandals showed suspicious images. PW3 then left to continue with his duty.

[5] PW4 arrested the appellant and contacted three other members of his team. PW4 did not inspect the bag and the sandals at KLIA. PW4 together with the members of his team brought the appellant and the exhibits to the customs office at Kampung Jijan, Nilai. There the investigating officer ('IO') Wee Sew Hin ('PW5') asked PW4 to conduct a thorough search.

[6] PW4 asked the appellant to sit opposite him while he inspected the sandals. Also present was photographer Mohammad Shuib bin Fauzi ('PW2') and another officer by the name of 'Kavisutha' who recorded the items seized and prepared the list exh P41. Kavisutha later handed over the list to PW5.

[7] PW4 testified amongst others as follows:

> Selepas itu saya arah OKT duduk depan saya. Saya periksa sandal tersebut. Semasa saya periksa, SP2 ambil gambar, Kavisutha sebagai pegawai pencatit. Selepas itu saya periksa sandal secara fizikal. Sandal dalam keadaan berbeza daripada sandal biasa. Saya memotong bahagian tepi sandal dengan menggunakan pisau dan mendapati terdapat satu bungkusan plastic. Apabila sandal itu terbuka dalam plastic terdapat serbuk jernih. Kemudian saya periksa sandal yang sebelah lagi dan juga memotong bahagian tepi sandal tersebut dan mendapati satu bungkusan plastic berisi serbuk Kristal.
>
> Sandal lain daripada sandal biasa kerana bahagian tengah sandal agak berbonjol. Keadaan sandal tidak ada kesan-kesan dikopek atau dipotong sebelum saya melakukan pemeriksaan ...

[8] According to PW4, the plastic packets were not visible unless the sandals were cut open. He could not pull out the plastic packets from the sandals for fear that the packets would tear and the contents would spill out. PW4 marked the bulging part of the sandals as 'A' (the right sandal) and 'B' (the

left sandal) in blue and the plastic packets containing the drugs inside the soles as 'A1' and 'B1' (see pp 296–297 appeal record). He also put down his signature and date. PW4 then handed over the appellant together with the exhibits seized to PW5 (exh P36) and also lodged a police report (exh D39).

[9] Likewise, PW5 marked the right sandal as 'A' and the plastic packet as 'A1', signed and put the date. He marked the left sandal as 'B' and the plastic packet as 'B1', signed and also put the date. PW5 testified that he questioned the appellant but the appellant was unable to converse in English or Malay. So PW5 arranged for an interpreter who came and interpreted the list exh P41 to the appellant. PW5 kept the sandals inside a steel cabinet in his room.

[10] PW2 the photographer confirmed in his testimony that on 15 June 2010 at about 12 noon, he was instructed by PW5 to take the photographs. He saw PW4 opening up the sandals and marking the exhibits. After PW4 had marked the sandals, PW5 also marked them. PW2 took photographs of the exhs P11 (1–17). The following day he took photographs of exhs P12(1) and 12(2) and P13.

[11] On 16 June 2010, PW5 took the sandals packed in a box which he marked as 'A' (exh P5) and the form 'Kimia 14' (exh D43) to the chemist, Zulkefli bin Mohd Edin ('PW6') who acknowledged receipt (exh P40).

[12] In exh D43, PW5 stated that the pair of sandals marked 'A' and 'B' were suspected to contain 'syabu', a dangerous drug and the gross weight of the sandal marked 'A' was 427g and the gross weight of the sandal marked 'B' was 363g. The total gross weight of both 'A' and 'B' was stated as 790g (p 337 appeal record).

[13] PW6 confirmed receipt of the box which contained a pair of sandals marked 'A' and 'B' inside which were transparent plastic packets of crystalline substance marked as 'A1' and 'B1' respectively. The plastic packet was secured to each sandal with adhesive tape. According to PW6, the plastic packets were difficult to remove.

[14] PW6 weighed each plastic packet. He found the packet marked 'A1' weighed 221.2g and the packet marked 'B1' weighed 184.7g. PW6 analysed the crystalline substance in each packet and found the crystalline substance contained methamphetamine. Packet 'A1' contained 169.8g of methamphetamine and packet 'B1' contained 142.4g of the same drug. PW6 prepared a chemist report (exh P42). On 21 September 2010, PW6 handed over the exhibits and the chemist report to PW5.

[15] The boarding passes (exhs P18 and P19) recovered from the appellant

showed that he had travelled from Damascus to Kuala Lumpur via Doha. The passenger electronic ticket (exh P38) was in the appellant's name.

FINDINGS OF THE TRIAL JUDGE

[16] At the end of the prosecution's case, the learned defence counsel raised two issues:

(a) doubt as to identity of the drug exhibits; and

(b) break in the chain of evidence relating to the exhibits.

[17] The trial judge found that the pair of sandals had been identified by PW3, PW4, PW5 and PW6 and the different terminologies used by the witnesses to describe the sandals did not affect their credibility. PW3 had handed over the appellant, the sandals and the bag to PW4 who had inspected the sandals at the customs office. The weight of the drugs stated in the charge is in accordance with the weight as certified by PW6 in his report. The trial judge found no merit on the issues raised in respect of the identity of the drug exhibits.

[18] The trial judge found that, at the time of arrest, the appellant had custody and control of the sandals containing the drugs and the prosecution could rely on s 37(d) of the Act to presume knowledge of the drugs. However, even without the aid of s 37(d), the trial judge found that based on the weight of the sandals, it was unlikely that the appellant did not know what was inside the sandals (*Teh Hock Leong v Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764). Based on the facts, the trial judge found that the irresistible inference was that the appellant had knowledge of what was in the sandals.

[19] The trial judge found that the concealment of the drugs in the sandals together with the fact that the appellant had travelled and transported the drugs to Malaysia amounted to 'trafficking' as defined in s 2 of the Act (*Teuku Nawardin Syamsuar v Public Prosecutor* [2010] MLJU 249; [2011] 3 CLJ 353; *Sia Pang Liong v Public Prosecutor* [2011] 6 CLJ 759). The trial judge found that the prosecution has established a prima facie case against the appellant and the appellant was thereupon called to enter his defence.

THE DEFENCE CASE

[20] The appellant did not deny that he had possession of the sandals at the time of his arrest. Neither did he deny that the drugs were found concealed inside the soles of the sandals. His defence was that he had no knowledge of the drugs.

[21] According to the appellant, he had been facing financial difficulties back home. One day his friend named 'Yasser', whom he had known for about five months, told him that he knows somebody in Teheran who has a business sending sandals and electrical stuff from Iran to Malaysia. They pay for the trip and upon return to Iran, they will pay USD2,500. According to the appellant, Yasser had sent many of his fellow villagers to Malaysia to deliver sandals and electrical stuff and he had paid them good money upon their return. He was told that there is a high demand for these goods because Malaysia is a hot country. The appellant said that he accepted the offer because he trusted Yasser and because he needed the money. He agreed to deliver the sandals and a hair straightener.

[22] About two weeks before his trip to Malaysia, Yasser brought the appellant to Teheran. The journey to Teheran by bus took about three to four hours. In Teheran, Yasser introduced the appellant to his friends, 'Reza' and 'Nader'. These two persons are friends of the people in Malaysia to whom the appellant was supposed to deliver the sandals.

[23] At this meeting, Nader gave the appellant a mobile phone and said that he would call the appellant. Four days before his departure to Malaysia, Nader called him to tell him about his flight details. Nader told him that from Teheran he would go to Damascus where Nader would meet him to pass to him the sandals.

[24] The appellant travelled to Damascus. At the Teheran bus terminal, Yasser gave him USD500. The appellant met Nader at Damascus airport, where Nader gave him the sandals. Nader also gave him a hair straightener and USD200. Nader told him that the USD500 given to him by Yasser also came from Nader.

[25] Nader told him the sandals were samples and he told the appellant to wear the sandals because the person who was to pick him up at KLIA would identify him by the sandals. However the name of this person was not mentioned, except that he was tall and would be wearing a black suit.

[26] The appellant wore the sandals from Damascus to KLIA. He only took them off in the plane. The appellant said he found nothing unusual about the sandals except that they were too big for him.

[27] The appellant said he was shocked when he was told that there were drugs inside the sandals. He said by gestures he had informed the officers that someone was waiting for him. An interpreter was called and when the officers understood what he was saying, they removed the handcuffs, gave him back the bag and sandals and he was asked to show this person. He was allowed to walk

pass the arrival hall to see if there was anyone who would come to collect the sandals, but no one came. He was then brought back into the airport. The appellant said that he had told the police about Yasser, Nader and Reza. He gave a cautioned statement (exh D45) the day after his arrest.

FINDINGS OF THE TRIAL JUDGE

[28] At the end of the defence case, the trial judge found that the appellant's story was not probable, reasonable or logical to cast a reasonable doubt on the prosecution's case. The trial judge said as follows:

> The Defence submitted that since the Accused had informed the police in his statement (P45) that he was carrying the sandals and the hair straightener as samples, the defence is not one of a belated defence. The Accused was nothing more than a 'country bumpkin' and it was wilful blindness.
>
> The story of the Accused is just not probable, reasonable or logical to cast a reasonable doubt in the Prosecution. He may be poor but cannot be so ignorant as not to appreciate who would pay such a big sum just to take a pair of sandals and a hair straightener all the way to Malaysia as samples as such items are easily available anywhere — *Public Prosecutor v Saimin*. Wilful blindness is not a defence.

The trial judge found the appellant guilty as charged, convicted him and sentenced him to death.

THE APPEAL

[29] Before us, learned counsel for the appellant raised two issues which were essentially the same issues raised before the High Court ie:

(a) discrepancy in the gross weight of the drugs seized; and

(b) break in the chain of evidence.

FIRST ISSUE

[30] This issue relates to the initial charge dated 29 June 2010 preferred against the appellant in which he was charged with trafficking an estimated 400g of methamphetamine (p 9 appeal record).

[31] In exh P36 dated 15 June 2010 prepared by PW4, it was stated that the gross weight of the sandal marked 'A' together with the drugs 'A1' was 427g and the gross weight for the sandal marked 'B' together with the drugs 'B1' was 363g (p 322 appeal record). The total gross weight was 790g. However in the chemist report, the total net weight of the crystals was stated as 405.9g.

[32] Learned counsel submitted that there was a difference in the weight of the drugs as stated in the initial charge and the weight obtained by the chemist

and this, submitted by learned counsel, raised the possibility that someone had removed the crystalline substance to obtain the gross weight as stated in the initial charge and then put the crystalline substance back into the plastic packets. Learned counsel had also referred to the oral testimony of PW6 where in re-examination, he had stated that the net weight was 465.9g, which counsel submitted contradicted his report in which he said it was 405.9g. Hence it was submitted that there was tampering of the evidence. It was further submitted that the analysis done by PW6 was flawed.

[33] The learned deputy public prosecutor ('DPP') in reply submitted that there was no discrepancy because the weight of the drugs in the charge preferred against the appellant was the weight obtained by the chemist as stated in the chemist report.

[34] Learned counsel conceded before us that there was no cross-examination of PW4 and PW6 on this issue. We wish to reiterate the trite principle that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of his testimony (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138 (FC)). The burden is on the defence to cross-examine both PW4 and PW6 on this issue.

[35] The Federal Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636; [2013] 6 CLJ 945 had said in its judgment that the determining factor in the weight of the drugs is the actual weight of the drugs as determined by the chemist which forms the basis of the charge. It is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department.

[36] We find that, in the absence of any challenge by way of cross-examination of PW4, PW5 and PW6 regarding the weight of the drugs, the issue of discrepancies in the weight raised by learned counsel for the appellant is devoid of any merit. We find no evidence to support learned counsel's suggestion that the drug exhibits could have been tampered with. As correctly pointed out by the DPP, the weight stated in the charge is the same as that stated in the chemist report. In any event, the discrepancy in the weight of the drugs alone should not ipso facto cast doubt on its identity (*Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649).

A SECOND ISSUE

[37] It was submitted by learned counsel that there was a break in the chain of evidence which raises doubt as to the identity of the exhibits. We have perused the facts and circumstances of this case and we find that the drug exhibits were marked and identified by PW4, PW5 and PW6. PW4 had marked and signed and dated the exhibits. PW5 did the same. PW5 had custody over the exhibits until he handed them over to PW6 for analysis. Upon completion of the analysis, PW6 then handed the exhibits back to PW5.

[38] We find no evidence to suggest a break in the handling or custody of the exhibits which tantamount to a break in the chain of evidence. We have no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drug exhibits that the appellant was charged with. In our view, learned counsel's contention that there was a break in the chain of evidence and that the drug exhibits produced before the High Court might not be the same as the one seized by PW4 from the appellant is misconceived. We are in no doubt that the drug exhibits admitted in evidence were the same exhibits seen by PW3, PW4 and PW5 and later analysed by PW6.

OUR FINDINGS

[39] There was overwhelming evidence that the appellant had custody, control and actual possession of the sandals when he was apprehended at KLIA. These facts were not challenged. The appellant had the sandals with him thorough out his journey from Damascus to Malaysia. Once it had been proved that the appellant had physical control and possession and, based on the circumstances the sandals were acquired by the appellant, the trial judge was justified in finding that the appellant had mens rea possession of the drugs contained inside the sandals.

[40] We find that it was improbable for the appellant not to be suspicious about the offer made to him to carry a pair of sandals all the way to Malaysia together with a promise of a substantial sum of money for his effort, payable upon his return. Further, it beggars belief that he did not take a look at the sandals particularly when he had admitted taking them off while on the plane. We were of the view that he would have felt the bulges in the soles of the sandals when he used them. He would have also noticed the adhesive at the sides of the soles. It was the adhesive that PW3 noticed (which PW3 described as 'berkilat' or shiny) when he first inspected the sandals. Ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination (*Ubaka v Public Prosecutor* [1995] 1 SLR 267).

[41] Based on the manner the drug was being carried, ie carefully concealed in the soles of the sandals to avoid detection and, taking into account the total amount of the drug involved, the trial judge was correct to apply s 2 of the Act, that the appellant was in fact carrying or conveying the drugs for the purpose of trafficking.

CONCLUSION

[42] We find no merit in this appeal. Having considered the totality of the evidence we were of the view that the trial judge had not erred in her findings that the prosecution has established the appellant's guilt beyond reasonable doubt. We find that the defence had failed to raise a reasonable doubt in the prosecution's case. Consequently we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum